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tion of a separate debt, should provide for a constructive levy on the debtor's share in the partnership property after payment of firm obligations, with the right in the co-partners or firm creditors to compel an accounting, rather than for an actual seizure of specific chattels. It is conceived that such a scheme secures an equitable adjustment of the rights of the various parties, and flows as a logical result from the rules of partnership bearing on the subject of the firm estate.

CONSTRUCTIVE TRUSTS ARISING FROM A PAROL PROMISE TO HOLD DEVISED LANDS IN TRUST.—Although the provisions of the Statute of Frauds prevent the enforcement of an oral express trust which is sought to be engrafted on a will,¹ a constructive trust will always be raised in favor of the beneficiary when the intention of the testator to create a trust is clear² and the fraud of the legatee renders it inequitable for him to keep the land.³ The courts will not, however, raise a trust upon the breach of the devisee's oral promise to convey or hold in trust unless there is conclusive proof of actual or constructive fraud.⁴ For, to permit every express trust unenforceable because of the Statute to be enforced as a constructive trust would virtually abrogate the Statute.⁵ On the other hand, to restrict the scope of fraud would allow the devisee to retain the fruits of his misconduct and find protection in the provisions of a statute which was enacted to prevent fraud.⁶ Just what constitutes constructive fraud is, therefore, a question not free from difficulty.⁷ A constructive trust will always be raised where an heir-at-law with a view to his own benefit prevents the testator from executing a will or codicil in favor of another;⁸ or where a devisee persuades him to execute a will by deceitfully promising to convey the land to the person designated by the testator.⁹ But such active persuasion is not essential; a mere reliance by the deviser upon the promise is sufficient to convert the devisee into a trustee *ex maleficio*¹⁰ if there is convincing proof that a fraudulent intent not to perform existed at the time the promise

¹The Statute of Frauds does not apply to chattels, 1 Perry, Trusts, (6th ed.) § 86.

²See Orth v. Orth (1896) 145 Ind. 184, 193.

³1 Perry, Trusts, (6th ed.) § 226, § 181, p. 289 n. (a).

⁴Heinisch v. Pennington (1907) 73 N. J. Eq. 456; McCormick v. Grogan (1869) 17 Weekly R. 961.

⁵3 Pomeroy, Eq. Juris., (3rd ed.) § 1056; Moore v. Campbell (1893) 102 Ala. 445; McCloskey v. McCloskey (1903) 205 Pa. 491.

⁶Browne, Statute of Frauds, (5th ed.) § 437 *et seq.*; Hoge v. Hoge (Pa. 1832) 1 Watts 163.

⁷Robson v. Harwell (1849) 6 Ga. 589, 613.

⁸Ragsdale v. Ragsdale (1890) 68 Miss. 92; Dixon v. Olmius (1787) 1 Cox's Eq. Cas. 414.

⁹Hoge v. Hoge *supra*; see Orth v. Orth *supra*. "Enforcing such a trust gives full effect to the will, but fastens upon the conscience of the party having procured the will on a promise, a trust which equity will enforce." Church v. Ruland (1870) 64 Pa. 432.

¹⁰Newis v. Topfer (1903) 121 Ia. 433; 3 Pomeroy, Eq. Juris., (3rd ed.) § 1054; Browne, Statute of Frauds, (5th ed.) § 94; see 5 COLUMBIA LAW REVIEW 407.

was made.¹¹ Moreover, by the great weight of authority, even though the devisee honestly intended to perform the promise when it was made,¹² equity will raise a trust if the testator relied on the promise in devising lands to the promisor.¹³

This extension of the doctrine of constructive fraud has been placed upon several different grounds. Under the influence of the old view that fraud at the time the promise was made was essential, in some jurisdictions it has been decided that a fraudulent intent not to perform the promise will be inferred from a subsequent failure to do so.¹⁴ The more practical view, however, is that constructive fraud is not necessarily based upon an imputation of actual fraud *ab initio*, but upon the breach of a conscientious obligation, consisting in the failure or refusal to perform the promise by which the property was secured.¹⁵ In some cases this conscientious obligation depends upon the relation of trust and confidence usually occupied by the legatee toward the testator.¹⁶ But such a relationship is not essential¹⁷ and however much confidence the testator may have had that the devisee would carry out his wishes, if no promise was made, no conscientious obligation will arise.¹⁸

When an unrequested oral promise to hold in trust for another is made subsequent to the bequest it is seldom a basis for a constructive trust because of a lack of proof that the deceased relied upon it,¹⁹ or even that he intended to create a trust at all,²⁰ although he is often induced by the promise not to alter a will already made.²¹ Thus, the Appellate Court of Indiana in the case of *General Convention of the New Church in the U. S. et al. v. Smith et al.* (Ind. 1913) 100 N. E.

¹¹Moore v. Campbell *supra*; Cassels v. Finn (1905) 122 Ga. 33, but see notes to the latter case, 2 Ann. Cas. 554, 556; 106 Am. St. Rep. 91, 94; Bedilian v. Seaton (1860) 3 Wall. Jr. 279. If no constructive trust is raised or if the trust raised is void, since the consideration for the devise fails, a resulting trust should arise for the benefit of the heirs. 20 Harv. Law Rev. 403; *In re Will of O'Hara* (1884) 95 N. Y. 403; see Oliffe v. Wells (1881) 130 Mass. 221.

¹²Ransdel v. Moore (1899) 153 Ind. 393, 408.

¹³Winder v. Scholey (1910) 83 Oh. St. 204, 33 L. R. A. [N. s.] 995, 996, n.; 21 Ann. Cas. 1379, 1384, n.; Amherst College v. Ritch (1897) 151 N. Y. 282; Barrell v. Hanrick (1868) 42 Ala. 60; cf. Moore v. Campbell *supra*; Gilpatrick v. Glidden (1888) 81 Me. 137; see Ahrens v. Jones (1902) 169 N. Y. 555.

¹⁴Dowd v. Tucker (1874) 41 Conn. 197; Larmon v. Knight (1892) 140 Ill. 232; Gemmel v. Fletcher (1907) 76 Kan. 577.

¹⁵Ransdel v. Moore *supra*; Powell v. Yearance (1907) 73 N. J. Eq. 117.

¹⁶Kimball v. Tripp (1902) 136 Cal. 631; see note to Stahl v. Stahl (Ill. 1905) 2 Ann. Cas. 774, 777.

¹⁷See Rollins v. Mitchell (1892) 52 Minn. 41.

¹⁸Whitehouse v. Bolster (1901) 95 Me. 458; see Hodnett's Estate (1893) 154 Pa. 485.

¹⁹See McCloskey v. McCloskey *supra*, 496.

²⁰See Hiddenheimer v. Bauman (1892) 84 Tex. 174. Because of the nature of the evidence required, delay on the part of the beneficiary will defeat his recovery. Whitton v. Russel (1739) 1 Atk. 448; Ammonette v. Black (1904) 73 Ark. 310.

²¹See Orth v. Orth *supra*.

384, recently refused to declare a trust in favor of the beneficiary because the evidence failed to prove conclusively that the promise to hold the devised land in trust influenced the testator. Indeed, the divergence of opinion among the courts as to the fraud necessary to sustain a constructive trust may well be attributed to the willingness of some, realizing that the purpose of the statute is to guard against fraudulent evidence, to effectuate the intent of the testator when the proof of it is incontrovertible.²²

²²See *Grant v. Bradstreet* (1895) 87 Me. 583; *Mead v. Robertson* (1908) 131 Mo. App. 185.